No. 19-56326

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, et al.,
Plaintiffs-Appellees,

v.

WILLIAM P. BARR, Attorney General of the United States, et al.,
Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
D.C. No. 2:85-cv-04544-DMG-AGR

NOTICE OF PRIORITY CASE UNDER CIRCUIT RULE 34-3 AND MOTION TO EXPEDITE BRIEFING AND HEARING SCHEDULE FOR APPEAL PURSUANT TO CIRCUIT RULE 27-12

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Defendants-Appellants ("Appellants" or the "Government"), through undersigned counsel, provide notice of this priority civil appeal pursuant to Ninth Circuit Rule 34-3(3) regarding appeals from permanent injunctions and respectfully move to expedite the briefing and hearing of this appeal pursuant to Circuit Rule 27-12. Under Rule 27-12, we have conferred with counsel for Plaintiffs-Appellees and they stated that they oppose expediting this appeal and request until Monday, November 18, 2019 to file an opposition.[1]

On August 23, 2019, the Government published comprehensive rules that effectuate the central tenet of the Flores Agreement to establish a "nationwide policy for the detention, release, and treatment of minors," implement the "relevant and substantive terms" of the Agreement, and ensure that minors in immigration custody are treated "with dignity, respect and special concern for their particular vulnerability." Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392–44,535 (Aug. 23, 2019); Agreement ¶¶ 9, 11.

The rules are the result of over 20 years of experience operating under the Flores Agreement, and reflect a comprehensive rulemaking effort addressing

[1] Pursuant to Circuit Rule 34-3(3), civil appeals from a permanent injunction are provided hearing or submission priority. The Court may also authorize expedited consideration upon a showing of good cause. *See* Circuit Rule 27-12(3).

custody and care for alien minors in the custody of the government. These rules thus impact a major portion of the immigration system, which is under significant stress given the recent and dramatic increase in the number of minors migrating to the United States, where hundreds of thousands of minors have been apprehended in the past year either unaccompanied or as part of family units. The rulemaking followed the consideration of over 100,000 public comments and addresses the complex issues that arise in the many circumstances in which minors come into immigration custody either with or without a parent or legal guardian.

The District Court permanently enjoined the rules on September 27, 2019, holding that some of the provisions conflicted with the Flores Agreement. It did so even though the rules largely parallel the Flores Agreement; more than 20 years have passed since the Flores Agreement was entered into; the Supreme Court has commanded that courts must apply a flexible termination standard to long term consent decrees, *Horne v. Flores*, 557 U.S. 443, 447-48 (2009); and the Agreement was designed to be a temporary measure that by its own terms provides for its termination upon the issuance of implementing regulations under the Administrative Procedure Act ("APA").

Because the District Court Order permanently enjoining the rules

significantly constrains the Executive's authority, overrides a considered APA rulemaking procedure that addresses a significant segment of the immigration system, and invalidates nationwide a full rulemaking based on finding a few provisions inconsistent with the Flores Agreement, we respectfully request expedited consideration of this appeal.

I. Procedural History.

The original complaint in this action was filed on July 11, 1985. Compl., ECF No. 1. Plaintiffs filed the *Flores* lawsuit to challenge "the constitutionality of [the Immigration and Nationality Services' ("INS")] policies, practices, and regulations regarding the detention and release of unaccompanied minors." Agreement at 3. When the challenge reached the Supreme Court in 1993, the class consisted of juvenile aliens, "not accompanied by their parents or other related adults," who were apprehended by the INS. *Reno v. Flores*, 507 U.S. 292, 294 (1993). Ultimately, the Supreme Court rejected Plaintiffs' facial challenge to an INS regulation concerning care of juvenile aliens. *Reno*, 507 U.S. at 305.

On remand from the Supreme Court, the parties entered into a settlement agreement to resolve the case. The Agreement became effective in early 1997. The stated purpose of the Agreement was to establish a "nationwide policy for the

detention, release, and treatment of minors in the custody of the INS." Agreement ¶ 9. Following apprehension, the legacy INS agreed to hold minors upon initial apprehension in facilities that are "safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors." *Id.* ¶ 12. The Agreement states the INS will promptly transfer minors to a licensed program either under set timelines or, in the case of an influx (defined as a situation where 130 minors are in custody at one time), "as expeditiously as possible." *Id.* ¶ 12.A.3.

The Agreement further addresses the procedures and practices governing the legacy INS's discretionary decisions to release or detain unaccompanied minors, and to whom they may be released. *See* Agreement ¶¶ 14–18. Concerning minors who remain in the custody of the INS, the Agreement requires (with certain exceptions) placement in a licensed program and provides guidelines for the conditions that must exist in such licensed programs. *Id.* ¶¶ 19–24, Ex. 1. Nowhere does the Agreement specify standards relating to the detention of minors apprehended with a parent or legal guardian – including conditions of custody, release, what to do when the parent must remain in detention under the immigration laws, or the role of the parent or legal guardian in custody or care

decisions regarding the child. As this Court explained, "the Settlement does not address the potentially complex issues involving the housing of family units and the scope of parental rights for adults apprehended with their children." *Flores v. Lynch*, 828 F.3d 898, 906–07 (9th Cir. 2016).

The Agreement was originally set to expire within 5 years but, on December 7, 2001, the parties agreed to a revised termination provision, which sets a termination date of "[forty-five] days following defendants' publication of final regulations implementing this Agreement." Stipulation, Dec. 7, 2001.

Proposed regulations were published in the fall of 2018. On August 23, 2019, the Department of Homeland Security (DHS) and the Department of Health and Human Services (HHS) published joint final regulations in the Federal Register. *See* Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 Fed. Reg. 44,392–44,535 (Aug. 23, 2019). The regulations are comprehensive and complex, and address the temporary custody, care, and transfer of unaccompanied alien children apprehended by DHS, the care and sponsorship of unaccompanied alien children in HHS custody, and the care, custody, and release of minors apprehended with their parents or legal guardians.

On August 30, 2019, the government moved to terminate the Flores Agreement. [Doc. ## 639, 634]. Plaintiffs had previously filed a motion seeking to halt the rulemaking process. The district court held a hearing on both motions on September 27, 2019. Following the hearing, on the same day, the district court permanently enjoined the regulations. [Doc. ## 688, 690].

II. ARGUMENT

There is good cause to expedite consideration of this appeal because the district court's permanent injunction significantly constrains the Executive's authority – locking two Executive Branch Departments into a decades-old consent decree that no longer reflects the exponential numbers of accompanied and unaccompanied minors seeking to cross the border and overrides a considered APA rulemaking procedure that included extensive public input. And it invalidates a rule in its entirety based on a conclusion that just a few provisions conflict with the Flores Agreement.

Additionally, the appeal should be expedited because federal agencies are facing uncertainty regarding operational choices at a watershed moment in irregular migration by children and family units. Since the Agreement was signed in 1997, the number of alien minors arriving in the United States, both

accompanied and unaccompanied, has skyrocketed. In 1993, the Supreme Court recognized that a surge of "more than 8,500 . . . [minors] – as many as 70% of them unaccompanied" – represented a "problem" that is "serious." *Reno*, 507 U.S. at 294. This was the operational environment when the Flores Agreement was negotiated, and the Agreement was concededly developed with only the issues relating to *unaccompanied* children in mind. *See Flores*, 828 F.3d at 906 ("the parties gave inadequate attention to some potential problems of accompanied minors").

These numbers have increased exponentially. In contrast to the 130 minors in custody defined as an "influx" in 1997, in 2019 there were periods with over 10,000 unaccompanied minors in HHS custody. In fiscal year 2019, over 80,000 unaccompanied alien children were encountered at the southwest border. https://www.cbp.gov/newsroom/stats/sw-border-migration.

The changes in family migration are even more dramatic. In FY 2019, over 500,000 members of family units were encountered at the southwest border. Indeed, irregular family migration has increased by *more than 33 times* what it was as recently as 2013—from 14,855 in FY 2013, to over 500,000 in FY 2019. *See id.*; 84 Fed. Reg. at 44,404.

The dramatic increase in minors crossing the Southwest border necessitates a comprehensive approach beyond that which was contemplated by the parties in 1997. Hence, the federal government published final regulations—following notice and comment rulemaking—that address operational circumstances as they exist today, not in 1997. Most of the regulations are fully consistent with the Flores Agreement – but were nonetheless enjoined – and the government explained in detail the reasons for any policy changes.

The concern of a lengthy appeal is heightened with respect to irregular family migration, where this Court has acknowledged that the Flores Agreement did not contemplate or address the many complex issues that arise. *Flores,* 828 F.3d at 906–07. The new rule addresses those complex issues, but has now been enjoined leaving the Agreement, which gave "inadequate attention to the" issues, in place. *Flores*, 828 F.3d at 906.

The injunction of those regulations creates ongoing uncertainty regarding execution of statutory functions. Prompt resolution of the appeal is essential for executive agencies to plan and respond to challenging, unprecedented migration issues. Regardless of how this Court may resolve the merits of this appeal, the public interest will continue to suffer from the uncertainty and delay occasioned by

the injunction of duly promulgated rules addressing a burgeoning crisis.[2]

In turn, the parties to this appeal are well versed with the issues presented by the Flores Agreement and the new rules. A lengthy briefing period is therefore unnecessary.

For these reasons, the Government respectfully asks that the Court expedite the briefing, hearing, and consideration of this appeal under Ninth Circuit Rule 27-12. The Government notes that the transcripts for this appeal have already been filed by the court reporter, and proposes the following briefing and argument schedule:

Fri., December 20, 2019	Defendants-Appellants' opening brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.
Tue., January 21, 2019	Plaintiffs-Appellee's answering brief and excerpts of record shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.

[2] The Government filed its notice of appeal of the District Court's order on November 14, 2019. On November 15, 2019, this Court entered a docketing order the opening brief due February 24, 2020; appellees brief due March 24, 2020; and reply brief due 21 days thereafter. Even assuming no extensions of time were sought and granted, according to this Court's website, this means that oral argument, if granted, would likely not occur until 2021. *See* Ninth Circuit Court of Appeals "Frequently Asked Questions," *available at* *http://www.ca9.uscourts.gov/content/faq.php*, at Question 17 (oral argument is typically held "approximately 9-12 months from completion of briefing.").

Tue., February 4, 2019	Defendants-Appellants' reply brief shall be served and filed pursuant to FRAP 32 and 9th Cir. R. 32-1.
First Available on Argument Calendar after Conclusion of Briefing	Oral Argument

DATED: November 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: August E. Flentje

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